[2016] JMCA Civ 44

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 90/2011

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

BETWEEN	**MUSSON (JAMAICA) LIMITED**	**APPELLANT**
AND	**CLAUDE CLARKE**	**RESPONDENT**

Dr Lloyd Barnett and Courtney Williams instructed by DunnCox for the appellant

Vincent Chen and Miss Sylvan Edwards instructed by Chen Green & Co for the respondent

20, 30 November 2015 and 23 September 2016

BROOKS JA

[1] Musson (Jamaica) Limited failed in its claim against Mr Claude Clarke from whom it sought certain monies on the basis of his having been unjustly enriched by a payment, it said, that it had made on his behalf. On 13 June 2011, Lawrence-Beswick J ruled that Mr Clarke had not been enriched by the payment. She gave judgment in his favour and ordered Musson to pay his costs of the claim.

[2] Musson has appealed from that judgment. It complains that the learned trial judge made errors in her findings in law and of fact, and as a consequence, arrived at the wrong decision. Its numerous grounds of appeal have been fully set out by my learned sister Sinclair-Haynes JA, whose judgment, in draft, I have had the privilege of reading. These are my reasons for agreeing with her decision to dismiss Musson's appeal.

[3] Although Sinclair-Haynes JA has set out fully the background to the claim, it is necessary for the essential aspects to be set out in this judgment for the purposes of context.

Background

[4] Apart from Musson and Mr Clarke, there are three other relevant parties involved in the background to the claim. They are:

(i) Highgate Food Products Limited (Highgate), for which Mr Clarke was the principal shareholder and managing director. Highgate was a manufacturer of chocolate products and confectionaries.

(ii) Candyman Jamaica Limited (Candyman), for which Mr Clarke was the principal shareholder and a director. Candyman was contracted as the exclusive distributor of Highgate products. It also distributed other goods,

including those produced by Kraft Foods International (Kraft).

(iii) Mr Desmond Blades, who was the executive chairman of Musson at the time of the transactions which are relevant to Musson's claim herein. He, apparently, died prior to Musson's claim being filed.

[5] Musson, Candyman and Highgate had an agreement in June 1998. By that agreement, Musson took over the distribution of Highgate's products and agreed to pay to Candyman a share of the profit of the sale. Candyman assigned, with Highgate's consent, the distribution rights which it held in respect of those products. It also turned over to Musson, the Kraft and Highgate products which it had, as well as the right to collect amounts due from its customers, to whom it had sold goods.

[6] It was a term of the agreement that on 15 August 1998 Musson would return to Candyman all unsold products and that Candyman would refund to Musson the cost of those products. Candyman, by that agreement, would also refund to Musson the face value of any uncollected receivables.

[7] When the August date arrived, the operation of the relevant clauses just mentioned, resulted in Candyman owing Musson for unsold products and uncollected receivables. The evidence of Mr Noel Hoo Fatt, a former director of Musson, is that the

"value of goods unsold and [uncollectible] debts was over $7.9 million" (page 19 of the record of appeal – volume 2).

[8] Here the distinction between Highgate and Candyman becomes somewhat blurred, as Musson's position was that the debt was due by either or both Highgate and Candyman. Neither one paid that debt. It is not clear if Highgate had any separate indebtedness to Musson at that time. Musson's accounts recorded that Highgate was one of its debtors. It does not appear that it regarded Candyman as a separate debtor. Accordingly, there will be, below, a reference to Highgate/Candyman as a single entity where the context requires it.

[9] On 18 August 1998, Mr Clarke executed a promissory note, in which he undertook to pay Musson the sum of $9,937,524.21. That very day, Musson endorsed the note over to Citibank NA (Jamaica Branch). The endorsement stipulated that Citibank would have "full recourse" to Musson. Musson sent a letter along with the note. The letter explained that in consideration of Citibank purchasing the promissory note from Musson, Citibank would have the option to call upon Musson at any time to repurchase the note for its face value. Citibank paid the proceeds of the note to Musson. The transaction did not require anything to be paid to Mr Clarke and nothing was paid to him thereunder.

[10] That note had a maturity date of 16 November 1998. The procedure upon maturity was that a new promissory note was prepared and presented to Mr Clarke for execution. He did so and Musson endorsed it over to Citibank. In a similar fashion, Mr

Clarke subsequently issued several other promissory notes for varying amounts in Musson's favour. Each note was intended to replace its predecessor. In every note, Mr Clarke based his obligation on the fact that he has received value. Musson endorsed each of those notes in turn in favour of Citibank. Each note stipulated that Citibank would have "full recourse" to Musson.

[11] It is apparent from the documentary evidence that when the various notes matured, it was Musson that satisfied the note. It was to Musson to which the proceeds of its replacement was issued. Two letters from Musson demonstrate this. In a letter dated 17 November 2000, Musson sent the then newly executed and endorsed promissory note to Citibank and requested Citibank to "make the cheque for the net proceeds payable to [Musson] and deliver same to bearer" (page 3 of the record of appeal – volume 3). In another case, a letter from Musson, dated 12 November 2001 (page 13 of the record of appeal – volume 3), stated that the note dated 17 November 2000 matured on the day of the letter. In that letter, Musson asked Citibank to:

(a) debit Musson's account with the principal sum;

(b) prepare a replacement note on the same terms, but for a lower figure, namely, $6,437,524.21; and

(c) credit Musson's account with the net proceeds of the replacement note as soon as the new note had been executed.

[12] The replacement note, which was issued pursuant to those instructions, was dated 16 November 2001. It had a face value of $6,437,524.21 and a maturity date of

16 February 2002. As was the case of the other notes, it was drawn by Mr Clarke in favour of Musson and was endorsed by Musson over to Citibank with "full recourse" to Musson.

[13] When that note matured, a change occurred. The next note, which was issued by Mr Clarke on 20 February 2002, although in the sum of $6,437,524.21 (the same value as the last-issued note), was issued in favour, not of Musson, as was the case for the previous note, but in favour of Citibank. No explanation was given to the court below for the change in the beneficiary of the note. As it had done in the case of all the previous notes, however, Musson endorsed the note over to Citibank with the terms "PAY: CITIBANK, N.A. (JAMAICA BRANCH) WITH FULL RECOURSE TO US".

[14] Mr Clarke issued two promissory notes thereafter. Each one superseded its predecessor. Both were drawn in favour of Citibank and were endorsed by Musson as it had done in the case of all the previous notes. On 18 November 2002, which was one day prior to the issue of one of the series of notes, Musson executed an instrument of guarantee and indemnity in favour of Citibank. In the document, Musson identified the principal debtor as Mr Clarke and guaranteed to pay Citibank on demand any liability owed by him. The consideration for the guarantee was the granting of a loan facility to Mr Clarke. There was, however, no other transaction involving Mr Clarke and he testified that he did not know of the issue of the guarantee and did not request it to be given.

[15] None of the proceeds of the note that was issued the next day was paid to Mr Clarke. It is not contested that in each case it was Musson that received the full proceeds of each note.

[16] On 15 November 2004, Musson wrote to Citibank informing it that it would not renew or extend its guarantee on the promissory note that was in force at that time and was scheduled to mature on 17 December 2004. It instructed Citibank to seek to recover the debt from Mr Clarke. Citibank sought to do so but Mr Clarke did not pay the sum due. Citibank then called upon Musson to pay the debt in accordance with its guarantee. Musson did so. The sum paid was $5,856,889.17.

[17] Musson then demanded payment from Mr Clarke of the sum which represented the original principal and interest that it had paid thereon over the years. Mr Clarke did not pay.

[18] On 29 November 2005, Highgate and Musson arrived at an arrangement whereby the debt owed to Musson by Highgate, then said to be $28,000,000.00, would be repaid, with interest on a large portion thereof, on or before 28 November 2011. The additional time was given in consideration of Highgate Holdings Limited (a separate company from Highgate) conditionally assigning its trademarks to Musson. There were other important aspects to the agreement but the relevant provision for these purposes was that if Highgate failed to pay the debt on the due date, the assignment would become unconditional and Highgate's debt would have been deemed discharged.

The claim

[19] In the claim giving rise to this appeal, Musson asserted that it guaranteed a loan to Mr Clarke by Citibank in the sum of $7,937,524.21 and that it had paid the loan, with interest, on the demand of Citibank. Musson contended that Mr Clarke had been unjustly enriched by its payment of the loan and his refusal to compensate it for that payment.

[20] The sum claimed was $12,136,200.07, or in the alternative the sum of $12,935,152.80. The smaller figure resulted from Musson having credited Mr Clarke's account with monies that Musson had owed to Highgate and to Mr Clarke. If, however, Musson asserted, Mr Clarke denied having authorised those credits, then the larger sum was due from him to it.

The major issues

[21] The major issue between the parties is a question of fact. Musson claimed that the debt owed by Mr Clarke to Musson was a personal debt, which was separate and apart from the debt due to it by Highgate/Candyman.

[22] Mr Clarke denied that contention. He asserted that he never had any personal liability to Musson. His case was that the execution of the first, and all subsequent promissory notes, was at the request of Mr Blades, who wanted to improve Musson's cash-flow, which had been negatively affected by the Highgate/Candyman debt. Mr Clarke asserted that he took no loan and received no money from Citibank.

[23] The critical issue of fact for resolution by the learned trial judge was whether Mr Clarke had a personal liability to Musson or Citibank which was independent of Highgate/Candyman's debt.

[24] The issues of law, concerning unjust enrichment, the liability for the promissory notes and other matters, all flow from the resolution of that critical issue of fact. It is also of critical importance to note that Musson's claim is not for payment of the promissory note, which Musson paid, or for an indemnity for having paid that note. The claim is for unjust enrichment.

The findings of fact

[25] The learned trial judge, having heard the witnesses and examined the documentation, found that, on a balance of probabilities, it was Mr Clarke's account which was to be believed. She found that there was no evidence that Mr Clarke had any liability to Musson "under the Highgate/Candyman transaction or indeed any transaction, whether discharged or not" (paragraph 37 of the written judgment).

[26] The learned trial judge found "on a balance of probabilities that Mr. Clarke speaks truthfully when he says that he signed [the promissory notes] on the instructions of the late Mr. Blades to prevent Musson's embarrassment, and not for any value for himself" (paragraph 47 of the judgment). She found that Mr Clarke had not "benefitted from Musson's payment to Citibank, of the value of the promissory note, by virtue of its guarantee" (paragraph 48 of the judgment). She therefore concluded that the claim for unjust enrichment could not succeed. On the learned trial judge's finding,

Musson was repaying money that it owed to Citibank and Highgate/Candyman's debt was dealt with by the agreement made between them and Musson on 29 November 2005.

Analysis

[27] The learned trial judge was entitled, on the evidence presented, to make the findings, which she did. Musson's witnesses had no first-hand knowledge of the transactions that led to the issue of the promissory notes. One of those witnesses, Mr Hoo Fatt, was instrumental in having Mr Clarke sign each of the promissory notes, but he merely did so on the instructions of Mr Blades. Mr Walker and Mr Messado, the other witnesses, could only speak to the accounting records that Musson managed, and their respective testimonies did not provide a full or reliable explanation of Musson's accounts of the transactions with Highgate, Candyman or Mr Clarke. The learned trial judge noted, at paragraph 33 of her judgment, that Mr Messado had deposed in an affidavit that there was no record that Mr Clarke owed any personal debt to Musson.

Having seen and heard the witnesses she was entitled to find that Mr Clarke's account was credible. An appellate court should not disturb a finding of fact where there is evidence to support such a finding (see **Industrial Chemical Co (Jamaica) Ltd v Ellis** (1986) 35 WIR 303). Musson's complaints that the learned trial judge ought not to have made the findings that she did, cannot succeed.

[28] The findings of fact in this case dictate the resolution of the issues of law raised in the claim. If, as the learned trial judge has found, Mr Clarke secured no benefit from

the transactions between the parties and had no separate liability from that owed by Highgate/Candyman to Musson, then the payment by Musson to settle a debt created by the Highgate/Candyman transaction, could not result in a benefit to Mr Clarke. The separate legal identity of Mr Clarke, as opposed to that of his companies, is beyond dispute. Such separate identity was recognised by the House of Lords from as far back as 1897, in **Salomon v Salomon and Company Limited** [1897] AC 22.

[29] The law in respect of unjust enrichment also demonstrates that Musson's claim must falter, as a result of the finding of fact made by the learned trial judge. The learned authors of The Law of Restitution, in their Fifth Edition of that work, at page 15, addressed the requirements for imposing an order for restitution:

> "…a close study of the English decisions, and those of other common law jurisdictions, reveals a reasonably developed and systematic complex of rules. It shows that the principle of unjust enrichment is capable of elaboration and refinement. It presupposes three things. First, the defendant must have been enriched by the receipt of a *benefit*. Secondly, that benefit must have been gained *at the plaintiff's expense*. Thirdly, it would be *unjust* to allow the defendant to retain that benefit. These three subordinate principles are closely interrelated, and cannot be analysed in complete isolation from each other. Examination of each of them throws much light on the nature of restitutionary claims and the principle of unjust enrichment…." (Italics as in original)

[30] In applying those three requirements to the circumstances of this case, Musson's claim falls at the first hurdle; based on the finding of fact, Mr Clarke has not benefitted from Musson's payment to Citibank. The debt to Musson was not his, but that of Highgate/Candyman. He did not benefit from the arrangement whereby Musson

received credit from Citibank. The payment was a settlement of Musson's debt to Citibank. The debt by Highgate/Candyman to Musson remained intact. The fact that Musson has incurred an expense is not sufficient. The learned trial judge held that Musson's claim faltered on the question of benefit. She was correct.

[31] The learned trial judge's decision has not done Musson an injustice. Musson has secured its compensation for the Highgate/Candyman debt. The 2005 agreement, which had not yet matured when the judgment in this claim was delivered, provided compensation which Musson regarded as satisfactory. As of 28 November 2011, it would have either been paid in full in settlement of the Highgate/Candyman debt or it would have become the unconditional holder by assignment of Highgate Holdings Limited's trademarks. Either situation would be its negotiated settlement of the Highgate/Candyman debt.

[32] It is for those reasons that I agree that the appeal should be dismissed with costs to Mr Clarke.

The counter-notice of appeal

[33] Although Mr Clarke filed a counter-notice of appeal, it is unnecessary, in light of the above finding, to examine the grounds advanced by him. I would make no order as to costs in respect of the counter-notice.

SINCLAIR-HAYNES JA

[34] This is an appeal from the order of Lawrence-Beswick J refusing Musson (Jamaica) Limited's (Musson) claim against Mr Claude Clarke (respondent) for unjust enrichment in the of amount $12,136,200.07 or in the alternative, the payment of the amount of $12,935,152.80 which Musson claimed it was obliged to pay Citibank NA (Jamaica Branch) (Citibank) to discharge the respondent's indebtedness to Citibank. The facts of this case are however, euphemistically atypical.

Background

[35] The respondent was, at all material times, the managing director and principal shareholder of Highgate Food Products Limited (Highgate) and the principal shareholder of Candyman Jamaica Limited (Candyman). Highgate was a manufacturer of chocolate products and confectioneries. Candyman was appointed its exclusive distributor on 1 June 1993. Candyman was also a non-exclusive distributor for Kraft Foods International (Kraft) products in Jamaica.

[36] On 5 June 1998, by a deed of assignment, Candyman assigned its rights as the exclusive distributor of Highgate products to Musson. It was a condition precedent of the deed of assignment that Candyman assigned its rights as the distributor of Kraft products to Musson. Musson assumed the business of distribution of Highgate and Kraft products. By virtue of clauses 1.1, 2.4 and 2.5 of the deed of assignment, it was agreed that as at 15 August 1998, Candyman would be responsible for the "bad stock and uncollectible receivables".

[37] On 18 August 1998, three days after the computation of the sum of $7,900,000.00 for uncollectible receivables and bad stock, the respondent issued a promissory note for the sum of $9,937,524.21 to be paid to the order of Musson. Subsequently, promissory notes were issued by the respondent who agreed to pay to the order of Musson on:

(i) 18 November 1999 the sum of $7,937,524.21;

(ii) 17 November 2000 the sum of $7,937,524.21; and

(iii) 16 November 2001 the sum of $6,437,524.21.

Each note was intended to replace its predecessor.

[38] In subsequent years, the respondent also issued promissory notes in which he promised to pay to the order of Citibank on:

(i) 20 February 2002 the sum of $6,437,524.21;

(ii) 19 November 2002 the sum of 5,500,000.00; and

(iii) 19 December 2003 the sun of $5,500,000.00.

Again, each note was intended to replace its predecessor. On 18 November 2002, Musson agreed to guarantee and indemnify Citibank against a loan facility it granted to the respondent, who was named the principal debtor therein.

[39] By way of letter dated 15 November 2004, Musson informed Citibank of its intention not to renew or extend the guarantee on the promissory note dated 19 December 2003, which matured on 17 December 2004. On Musson's instructions, Citibank sought to recover the debt from the respondent. Its attempts however failed.

Consequently, it called upon Musson, as guarantor, to repay the debt. Musson paid Citibank but claimed that it has not been reimbursed by the respondent. The conflict between the parties is essentially whether the respondent is personally responsible for the loan and has thus enriched himself.

[40] It was Musson's claim that it stood as guarantor in respect of a loan facility granted to the respondent from Citibank in the sum of $7,937,524.21 (being principal and interest) and that loan facility was extended and renewed through a series of promissory notes (dated 17 November 2000, 20 February 2002, 19 November 2002 and 19 December 2003). The respondent, on the other hand, contended that the loan facility was for the benefit of Musson to reduce Highgate's indebtedness to it and the indebtedness was the responsibility of either Musson or Highgate and not his.

Musson's evidence at the trial

[41] Mr Noel Hoo Fatt and Mr Peter Walker testified on behalf of Musson. Mr Hoo Fatt was a former director of Musson and Mr Walker, its chief accountant. Mr Geoffrey Messado, Musson's financial controller, deponed to two affidavits in support of Musson's claim.

Mr Hoo Fatt's evidence

[42] Mr Hoo Fatt's evidence essentially was that the respondent was not asked to sign, as a borrower, to facilitate Musson obtaining funds from Citibank. It was his evidence that on or about 17 November 2000, the respondent issued a promissory note to Musson in the sum of $7,937,524.21 in respect of debts owed to Musson. The

promissory note was sold to Citibank and Musson received the proceeds from the sale of the note. As a consideration for the sale of the note, Musson agreed to guarantee a personal loan to the respondent by Citibank.

[43] New promissory notes were subsequently prepared by Citibank and signed by the respondent on 16 November 2001, 20 February 2002, 19 November 2002 and 19 December 2003. These promissory notes reflected new balances on the debt. They confirmed receipt of value for the notes by the respondent and the respondent's promise to pay the value of the respective notes.

[44] By letter dated 15 November 2004, he said Musson advised Citibank to have the respondent settle his debt with the bank. Citibank's attempts at so doing proved futile. Consequently, by way of letter dated 25 February 2005, Citibank demanded payment from Musson, as guarantor of the respondent's debt. On 28 February 2005, Musson paid the sum of $5,856,889.17 to Citibank.

Mr Walker's evidence

[45] Mr Walker's evidence was that Musson maintained two accounts for Highgate and one for the respondent which it maintained from 13 November 2001. Musson has paid a total sum of $12,955,967.84 under the guarantee agreement to Citibank. Under cross-examination, Mr Walker said:

> (i) the debit entry of $7,900,000.00 on 13 November 2001 on the respondent's account was in respect of a promissory note, signed by the respondent regarding

inventory and receivables that Musson took over from Highgate; and

(ii) the credit entry of 19 November 2001 to Musson's account of $5,700,000.00 concerned the same promissory note.

He was however unable to say whether the entries reflected a roll-over. He was unable to speak to transactions prior to 2001 and based all his entries on Citibank's statement.

[46] It was his evidence that on or about 13 December 2001, Musson used $354,063.83 it held for Highgate under the profit sharing agreement to offset the respondent's indebtedness to it. Also, on or about 10 July 2003 and 5 September 2003, goods valued at $161,333.34 and $444,888.90, respectively, which Highgate supplied to Musson, were also used to offset the respondent's debt to Musson.

Mr Messado's evidence

[47] Mr Messado, in support of Musson, initially deponed that there was no document, in Musson's possession, that Highgate was ever indebted to it. The debt was the respondent's personal debt. According to him, that assertion was "confirmed by the Promissory Note dated August 18, 1998". In a later affidavit, he resiled from the statement concerning documents of Highgate's indebtedness to Musson and admitted that accounts for Highgate, which were numbered 13676 and 13675, were located. It was however his evidence that the claim was not in respect of those accounts but in respect of the respondent's personal account which was numbered 12005.

The respondent's evidence

[48] The respondent refuted Musson's assertions that he ever received any benefit from either Citibank or Musson. He contended that he was therefore not liable to either. He denied having enriched himself by any payment made by Musson. He said he was not the managing director of Candyman. He was however, the chairman of the board and the principal shareholder.

[49] The respondent's evidence was that Musson became the distributor of Highgate products from June 1998. In June 1998, it was agreed that Musson would purchase Highgate's inventory, receivables and distribution rights for Highgate and Kraft products which Highgate, prior to the agreement, distributed.

[50] Pursuant to that agreement, Highgate was to repurchase all unsold inventory and uncollected receivables, which were not sold or collected by 15 August 1998. Consequently, Highgate became indebted to Musson in the sum of approximately $7,000,000.00. It was the respondent's evidence that he was informed by Mr Blades that Highgate's inability to pay Musson would result in embarrassing cash flow problems for Musson.

[51] The respondent said that Mr Blades presented him with a solution to the problem, some days after, which led him to meet with Mr Peter Moses at Citibank. Mr Blades, he said, arranged with Mr Moses that Citibank would pay Musson the amount which Highgate owed Musson. That payment was made in exchange for a promissory note signed by him (the respondent) and guaranteed by Musson.

[52] His evidence was that he was informed by Mr Blades that only Citibank was willing to grant him (Mr Blades) a loan but it would only do so if the respondent provided a promissory note in his (the respondent's) name. This was because Highgate's financial problems were well known in the banking community while the respondent's name was still reputable .

[53] His understanding of the arrangement from Mr Blades was that Musson, as the recipient of the funds and guarantor of the promissory note, accepted responsibility for its repayment. His signing of the promissory note was merely facilitative. He received no money from Citibank nor did he have any other contact with either Mr Moses or any other person at Citibank concerning the matter. Subsequently, Mr Hoo Fatt gave him promissory notes which he signed with the understanding that the said notes were to "give effect to the arrangements" he had with Mr Blades.

[54] It was also his evidence that on the first annual rollover of the promissory note, he was informed by Mr Blades that a condition had been imposed by Citibank that the principal be reduced. He was unsure whether the reduction should have been by $1,000,000.00 or $2,000,000.00. The sum was paid by Highgate.

[55] The respondent also asserted that the interest on the said note had been paid in advance by Musson and had been over the years debited in increments against Highgate's account. Neither Musson nor Citibank, demanded payment from him or ever required him to personally pay under the promissory notes. Before Citibank demanded payment from him, and at least four years after he signed the first note, he received a

statement of account from Musson in his name which stated that he was personally indebted to Musson. Consequently, his accountant, on his instructions, wrote to Mr Hoo Fatt concerning the matter. No response was however forthcoming from either Mr Hoo Fatt or any representative of Musson.

[56] The respondent further asserted that whilst Musson and Highgate were conducting a reconciliation of their accounts, it was discovered that a sum which was due to Highgate from Musson was not reflected in the running account which Musson had provided. Upon inquiries being made and the documents examined, it was discovered that Musson had unilaterally applied the amount that was due and payable to Highgate, into the account which related to the promissory notes.

[57] He was informed by Mr Paul Scott, Mr Blades' grandson and one of Musson's executives, that he (Mr Scott) would not, contrary to agreement with Mr Blades, renew its guarantee with Citibank. In December 2004, he was contacted by Citibank and subsequently met with Ms Peta Gaye Williams of the bank concerning the loan. He received a demand letter for the sum of $5,500,000.00 plus interest from Citibank. He was however never sued by the bank nor has he received any further demand although he has not paid it.

The appeal

[58] The learned judge entered judgment with costs in the respondent's favour. Musson being wholly dissatisfied with the learned judge's decision filed the following grounds of appeal:

"a. The Judgment is against the weight of the evidence and ought to be set aside.

b. The learned Judge misunderstood the facts before her and the law applicable thereto.

c. The learned Judge's [sic] erred in law in her interpretation of section 88 of the Bills of Exchange Act. Having concluded in paragraph 6 of the judgment that:
'There is no challenge to the legality or authenticity of the promissory note…'
The [respondent] having signed to say that he had 'received value' issues such as the parties disagreement as to the circumstances under which the promissory notes arose and whether there was 'evidence of consideration to cause [the respondent] to have signed a promissory note in his personal capacity' is [sic] irrelevant to the questions the learned judge had to determine.

d. The learned Judge erred in law in concluding that the three tenets of the principle of 'unjust enrichment' had not been fulfilled. The benefit gained by the [respondent] was the discharge of the liability under the promissory note.

e. The learned judge's finding in paragraph 29 of the decision that: '[The respondent] was a stranger to the details of the arrangement between Citibank and Musson' is inconsistent with the finding at paragraph 28 that: 'Both parties appreciated that the debt….and both parties co-operated to alleviate the problem by obtaining money through Citibank, with Musson guaranteeing the payment of the note which had been signed by [the respondent]'.

f. The learned judge misconstrued the 'law on guarantee'. At paragraph 42 of the judgment the learned judge quoted a passage from the judgment of Scarman L.J. in *Owen v Tate* [1976]1 QB 402 C.A. The full passage reads as follows:

'In my judgment the true principle of the matter can be stated very shortly, without

reference to volunteers or to compulsions of the law, and I state it as follows. If without antecedent request a person assumes an obligation or makes payment for the benefit of another; the law will, as a general rule, refuse him a right of indemnity. But if he can show that in the particular circumstances of the case there was some necessity for the obligation to be assumed, then the law will grant him a right of reimbursement if in all the circumstances it is just and reasonable to do so.'

The learned judge was in error in omitting and failing to consider the 'just and reasonable' aspect of the Scarman [sic] judgment.

g. The learned Judge erred in reaching her conclusion on the issue of subrogation. [Musson] had waived its rights of subrogation only in respect of Citibank.

h. The learned Judge erred in reaching the conclusion that the [respondent] did not benefit from the payment by Musson to Citibank and that he was not unjustly enriched.

i. Generally, the findings by the learned Judge on the issues are, at times, inconsistent, erroneous and unsupportable." (Emphasis as in original)

[59] Musson also challenges the learned judge's findings of fact as follows:

a. "It is clear that the promissory notes arose as a result of the Highgate/Candyman transaction." (Paragraph 13)

b. "I find on a balance of probabilities that the agreement was between Musson, Candyman and Highgate and that that was the intention of the parties. Both the late Mr Blades and [the respondent] held critical positions in their respective business [sic] which they represented in the Highgate/Candyman transaction. I find that each would be aware of the difference between the entities Highgate, Candyman and the person [the respondent] and that they put

the words in the agreement reflecting their intention to bind Highgate. Candyman and Musson only, not [the respondent] in his personal capacity." (Paragraph 26)

c. "Both Mr. Blades and [the respondent] were aware that the Highgate/Candyman [sic] transaction was between Musson and Highgate, yet both agreed that [the respondent] would sign the promissory notes concerning the agreement." (Paragraph 27)

d. "Both parties appreciated that the debt was Highgate/Candyman's [sic] and both parties co-operated to alleviate the problem by obtaining money through Citibank, with Musson guaranteeing the payment of the note which had been signed by [the respondent] ." (Paragraph 28)

e. "[The respondent] unchallenged evidence is that on each occasion Musson's representatives handed him the promissory note to sign and he signed, not noticing that there had been a change in the payee. [The respondent] was a stranger to the details of the arrangement with Citibank and Musson." (Paragraph 29)

f. "It is unchallenged that [the respondent] owed no money to Citibank and that Citibank paid him no money. The only parol [sic] evidence concerning Citibank's [sic] involvement is from [the respondent] who testified that it was Mr Blades who proposed and executed the Citibank arrangement to solve a problem. (Paragraph 30)

g. "It is not clear as to which liability would have been discharged. Is it the liability of outstanding monies under the 1998 transaction owed to Musson or is it the liability to Citibank under the promissory notes? (Paragraph 36)

h. "However, there is no evidence of [the respondent] himself having a liability to Musson under the Highgate/Candyman transaction or indeed any transaction, whether discharged or not." (Paragraph 37)

i. "The other liability of which there is evidence, arises under the promissory notes. [The respondent] had promised to pay a specified amount to Musson on some notes and to Citibank on others. The liability was either [sic] Musson or Citibank." (Paragraph 40)

j. "I find on a balance of probability [sic] that [the respondent] speaks truthfully when he says that he signed on the instructions of the late Mr. Blades to prevent Musson's embarrassment, and not for any value for himself." (Paragraph 47)

k. "The effect of the transfer of the promissory notes by Musson to Citibank with the accompanying guarantee was to allow Musson to utilise that amount which was receivable by it from Highgate/Candyman and which they had failed to pay. The benefit was to Musson which, by that process, averted what could have been an embarrassing cash flow problem." (Paragraph 48)

[60] Musson also challenged the following findings of law by the learned judge:

" a. ...that the agreement was between Musson, Candyman and Highgate and that was the intention." (Paragraph 26)

b. "There is no evidence that [the respondent] obtained any benefit from the payment by Musson to Citibank of the amount under the guarantee." (Paragraph 33)

c. "Recoupment can only be ordered if the claimant had authorised the payment made or ratified it...Here, in the instant case, any debt which may have arisen would have arisen by contract.

...It is not clear as to which liability would have been discharged. Is it the liability of outstanding monies under the 1998 transaction owed to Musson or is it the liability to Citibank under the promissory notes?

Not to be overlooked is the requirement that before [the respondent] is ordered to make restitution he must have obtained a discharge of his liability by virtue of the payment." (Paragraph 36)

d. "There is no evidence of any consideration to cause [the respondent] to have signed a promissory note in a personal capacity." (Paragraph 47)

e. "...[the respondent] has not benefitted from Musson's payment to Citibank, of the value of the promissory note, by virtue of its guarantee..." (Paragraph 48)

f. "...No one was unjustly enriched in the process. The remedy of subrogation may have been available to Musson to recover its money against [the respondent] but it had agreed with Citibank not to pursue that remedy." (Paragraph 48)

[61] On the other hand, the respondent, by way of counter-notice, filed on 4 August 2011, has asked us to affirm the learned judge's decision on the following additional grounds:

"(a) The promissory notes signed by the Respondent were accommodation notes only;

(b) That neither Citibank N.A nor [Musson] was entitle [sic] to enforce any of the promissory notes against the Respondent as neither was a holder in due course; and

(c) No liability on the part of the Respondent arose under any of the promissory notes."

Ground a

The judgment is against the weight of the evidence and ought to be set aside.

Musson's submissions

[62] The following are the learned judge's statements which Musson has sought to impugn:

> "22. It would therefore be useful to consider here, the evidence as to who was/were indebted to Musson. Musson has provided evidence of accounts it maintained for monies owed to it by[the respondent] , Highgate and Candyman. The only evidence of indebtedness of [the respondent] or the companies to Musson is the indebtedness which resulted from the agreement created on August 15, 1998 [sic] that Musson would take over the distribution of Highgate products.
>
> ...
>
> 26. I find on a balance of probabilities that the agreement was between Musson, Candyman and Highgate and that that was the intention of the parties. Both the late Mr. Blades and [the respondent] held critical positions in their respective business which they represented in the Highgate/Candyman transaction. I find that each would be aware of the difference between the entities Highgate, Candyman and the person [the respondent] and that they put the words in the agreement reflecting their intention to bind Highgate, Candyman and Musson only, not [the respondent] in his personal capacity.
>
> ...
>
> 29. I am fortified in my view by the fact that the promissory notes were eventually written with Citibank, not Musson, as the lender. The promissory notes drawn by [the respondent] from August 18, 1998 to November 16, 2001 showed Musson as the lender but from February 20, 2002 to December 2003 they showed Citibank as the lender. Musson's witnesses provide no explanation as to why this change occurred..."

[63] On behalf of the Musson, Dr Lloyd Barnett submitted that the learned judge's conclusion was against the evidence and effect of the several promissory notes which began with the promissory note of 17 November 2000 in which the respondent promised to pay the sum of $7,937,524.21 to Citibank "for value received" and on which there are the endorsements "with full recourse to [Musson]". Dr Barnett

contended that none of the promissory notes made any reference to Highgate/Candyman, nor did the respondent allege that neither Highgate nor Candyman did not have the legal capacity necessary to issue the promissory notes in its own capacity.

[64] It was also his submission that the learned judge erred in stating, at paragraph 29 of the judgment, that:

> "...[The respondent's] unchallenged evidence is that on each occasion Musson's representatives handed him the promissory note to sign and he signed, not noticing that there had been a change in the payee. [The respondent] was a stranger to the details of the arrangement between Citibank and Musson."

[65] Learned counsel argued that it was difficult to accept that the respondent, "a literate businessman", failed to realize that he signed at least five promissory notes in his personal capacity. Dr Barnett however said that, on the respondent's evidence, he was aware of the importance of the arrangements from the discussions and the agreement he had with Mr Blades.

[66] Learned counsel was also critical of the learned judge's examination of the creation of the debt whilst, according to him, failing to appreciate that the signed and stamped promissory notes (which were never in issue), were in fact, evidence of the liability. He further criticized the learned judge's finding which is stated hereunder, on the basis that it was an irrelevant consideration:

> "...[O]n a balance of probabilities that the agreement was between Musson, Candyman and Highgate and that that was

> the intention of the parties...I find that each would be aware of the difference between the entities of Highgate, Candyman and the person [the respondent]..." (Paragraph 26)

[67] He contended that Musson did not allege that the respondent owed Highgate's debt, but rather, that he unjustly enriched himself because he was relieved of his liability to Citibank which came about by a debt based on the promissory notes which he issued to Citibank and which Musson was called upon as guarantor to repay and did repay.

[68] Learned counsel posited that the learned judge's findings conflicted with the respondent's evidence, at paragraphs 6 and 7 of his witness statement filed on 26 April 2010, that:

> "6. Some days later Mr. Desmond Blades approached [the respondent] and suggested a solution to the problem. The solution was that he (Mr. Blades) had arranged with Peter Moses at Citibank for Citibank to pay [Musson] the amount owed by HIGHGATE in exchange for a Promissory Note signed by [the respondent] and guaranteed by [Musson].
>
> 7. Mr. Desmond Blades further asserted that Citibank was the only bank from which he could secure the loan and that it would only be prepared to do so on the basis of a Promissory Note in [the respondent's] name and not that of HIGHGATE as the financial problems of the company were already known in the banking community. However [the respondent's] name was still very good and could command the confidence of the bank."

[69] Dr Barnett argued that the reasonable conclusion was that the respondent was aware that Musson had paid the sums he owed Citibank to discharge his liability

because he admitted receiving demand letters from Citibank and had heard nothing further from Citibank although he did not pay any money in respect of the demand. According to learned counsel, the learned judge erred in finding, in the face of that evidence and the promissory notes which the respondent executed in favour of Citibank, that he was not unjustly enriched when his liability was discharged by Musson.

The respondent's submissions

[70] Mr Vincent Chen, on behalf of the respondent, however submitted that Musson has disregarded the evidence concerning the real transaction and has ignored the genesis of the dealings which gave rise to the debt. He submitted that on 15 August 1998, the sum of $7,900,000.00 became due to Musson from Candyman, consequent on the 5 June 1998 assignment agreement. The respondent did not guarantee the loan nor did he guarantee the agreement of 29 November 2005.

[71] The learned judge, he said, correctly identified the issue, reviewed the conflicts in Messrs Hoo Fatt and Walker's evidence and arrived at the only reasonable conclusion to be drawn, which was that there was only one debt which arose from the 5 June 1998 agreement for Musson to take over, from Candyman, the distribution of Kraft and Highgate products.

[72] He submitted that there was no history of the accounts. Although Musson's witnesses endeavoured to convey the impression that the account began in November 2001, the witnesses were unable to support the assertion. Mr Hoo Fatt's evidence, he said, was that he was not the accountant at the material time while Mr Walker was

ignorant as to matters concerning the transaction which occurred before November 2001. Learned counsel pointed out that the evidence before the court was supportive of the learned judge's finding.

[73] Learned counsel pointed out that the only debt that was due to Musson in 1998 was the sum of $7,900,000.00 from Highgate/Candyman, which debt became due on 15 August 1998. Mr Walker's evidence was that account numbered 12005 belonged to the respondent. He however admitted that there were entries in that account which related to Highgate's transactions.

[74] Learned counsel posited that Mr Hoo Fatt, in his evidence, although ignorant as to the details of the agreement between Mr Blades and the respondent, was aware that Musson maintained separate accounts for the respondent and Highgate. He pointed out that the evidence was also that some entries on the respondent's account concerned Highgate's transactions.

[75] According to learned counsel, an inspection of the computer reconciliation of account receivables from Musson between January 2001 and October 2008 in respect of account numbered 12005 (exhibit 1B), reveals that the entry of $7,937,524.21 on 13 November 2001 was only one part of the entry made which was to give effect to the renewal or the rollover of the 17 November 2000 promissory note and makes it manifest that there was a degree of deception. Similar set of entries was made on 14 January 2003 which was also giving effect to a renewal or rollover.

[76] Mr Chen also contended that before the learned judge was Mr Walker's evidence that he treated Highgate/Candyman and the respondent as one and the same. His evidence was that there was only one account maintained for them. He pointed out that the accounts were not separate. Exhibit 1B, he said, also represented the Highgate transactions. He pointed out that, on Mr Walker's evidence, the payments to Musson for Citibank which were represented on the extract and on exhibit 1B, were amounts which were paid by way of set off by Musson against amounts which were due to Highgate on invoices for goods supplied by Highgate.

[77] Mr Chen noted that Mr Messado, in his affidavit, emphasized that there were separate accounts for Highgate and the respondent. Learned counsel submitted that Mr Messado's averment in his affidavit deliberately sought to convey the false impression that the respondent's account (account numbered 12005) commenced in 2001 with an entry of $7,937,524.21 in respect of a promissory note.

[78] He pointed out that Mr Walker admitted that journal voucher numbered 3042 (exhibit C), which represented the respondent's account, was actually created by extracting the information from exhibit 1B. Mr Chen posited that although Musson failed to produce the accounts before the opening balance on exhibit 1B, the promissory notes and correspondence with Citibank establish that there were transactions before November 2001. Mr Walker, he pointed out, admitted that there were earlier entries in respect of the renewal of notes. The written documents and the promissory notes corroborated the respondent's case that the first note was signed in August 1998 and was renewed from time to time.

[79] Learned counsel submitted that the learned judge correctly accepted the respondent's evidence as to the creation and existence of the debt, which was clear, consistent and devoid of ambiguities. He submitted that the learned judge rightly rejected Musson's witnesses because of the conflicts among them.

Ground c

The learned judge erred in law in her interpretation of section 88 of the Bills of Exchange Act.

Musson's submissions

[80] Dr Barnett's submission was essentially that the respondent cannot deny having received value, because the series of promissory notes is evidence that he promised to pay either Musson or Citibank various sums for value he had received. He pointed out that the notes were duly signed by the respondent and stamped.

[80] Learned counsel criticized the learned judge's statement, at paragraph 32 of her reasons for judgment, that there was no documentary evidence which obliged Highgate/Candyman or the respondent to pay Citibank. He posited that all the promissory notes which the respondent signed were formal assumption by him of liability to Citibank. The respondent, he said, is therefore precluded from asserting that he signed at Mr Blades' request. In support of that proposition, he relied on sections 3, 27, 88 and 89 of the Bills of Exchange Act and the case **Glasscock v Balls** (1889) 24 QBD 13.

[81] Dr Barnett also submitted that on the respondent's own evidence, he agreed that Musson would provide accommodation for Highgate/Candyman via credit facilities

granted by Citibank with his concurrence and agreement to issue the promissory notes and Musson's undertaking to act as guarantor. In relying on the case **Mason v Lack** (1929) 45 TLR 363, he posited that, in those circumstances, the "mutual promises furnished more than adequate consideration".

[82] He contended that by signing the promissory note and not indicating he was acting as an agent, the respondent became personally liable. Dr Barnett directed the court's attention to section 26 of the Bills of Exchange Act. He contended further that as a principal party to the arrangements, when Musson discharged the respondent's liability, he became liable to Musson as it had a lien on the notes.

[83] Learned counsel also argued that the respondent would be liable to Musson (the holder in due course) on the promissory notes even if he was only an "accommodation party". According to counsel, the endorsements on the notes evidenced the guarantee given by Musson to Citibank, if the respondent's promises, which were freely given for value which he acknowledged receiving, were not honoured.

[84] It was also learned counsel's firm submission that the respondent's indebtedness was initially to Musson under the promissory note of 17 November 2000. The promissory note was sold to Citibank for which Musson received value. Musson having received the proceeds of that note, the respondent's indebtedness was transferred from Musson to Citibank and he became a beneficiary of a loan from Citibank, which Musson guaranteed.

[85] In the alternative, he submitted that even if the respondent was no longer indebted to Musson under the initial arrangement, the fact that Musson had to repay Citibank the sums it had received toward satisfying the debt meant that the debt re-arose.

The respondent's submissions

[86] Mr Chen, on the other hand, submitted that Musson continues to disregard all of the evidence as to the reason Citibank paid money to Musson. That was, he said, a deliberate attempt to mislead the court by omission. He argued that the evidence has clearly established that the genesis of the relationship between the respondent and Musson was the agreement of 5 June 1998.

[87] Learned counsel submitted that, at paragraphs 14, 23 and 32 of her reasons for judgment, the learned judge pointed to the evidence which supported the fact that the debt originated in 1998 as a debt of Highgate/Candyman. He argued that the learned judge highlighted Mr Hoo Fatt's evidence regarding the contract of 5 June 1998, which she referred to as the Highgate/Candyman issue, which resulted in a debt of $7,900,000.00 being owed to Musson.

[88] Mr Chen drew the court's attention to the learned judge's examination of the respondent's evidence which spoke to the circumstances which led to the issuance of the first promissory note of 18 August 1998. The subsequent notes, he submitted, were based on that first note which was renewed from time to time in accordance with

the requests of Mr Blades. Learned counsel submitted that there was abundant evidence from Musson's witnesses which supported the learned judge's finding.

[89] He pointed out that, at paragraph 23 of her decision, the learned judge dealt with the evidence of Mr Messado, who, in an affidavit of 17 January 2009, deposed that Musson had no documents showing that Highgate was ever indebted to Musson and that the promissory note of 18 August 1998 was evidence of the respondent's personal indebtedness to Musson.

[90] Mr Chen submitted that the learned judge noted, at paragraph 33 of her reasons, that there was no evidence from Mr Messado as to how the personal debt arose. Indeed, the learned judge remarked that Mr Messado's averment in his affidavit was that there is no record of any personal debt of the respondent to Musson.

[91] It was his further submission that the learned judge recognized that Mr Messado's evidence was contradictory because in a later affidavit, he swore that the promissory note dated 18 August 1998 confirmed that the debt was first a personal debt of the respondent. He submitted that the learned judge correctly concluded, at paragraph 39 of her judgment, that the 1998 liability was not the respondent's.

[92] Mr Chen submitted that by the respondent's amended defence and Musson's amended reply thereto, Musson shifted its position from relying on the note of 17 November 2000 as the beginning of the transaction (creating the loan) to the note of 18 August 1998. He said the learned judge rightly rejected the evidence of the

witnesses for Musson in relation to their attempt to ignore the true history of the transaction by making it appear that it began with the note of 17 November 2000.

[93] The learned judge, he said, was constrained to look at the full history of the transaction from which it is apparent that this was not a simple case of a bill of exchange. The provisions of section 88 of the Bills of Exchange Act did not address the situation in the instant case, he said, as there was much more to the transaction. In the circumstances, not only was it necessary for the learned judge to make a determination as to the real transaction, she was also entitled to do so.

[94] Having carefully reviewed the argument of Musson and the evidence, he submitted, she properly concluded, at paragraph 48 of her reasons, that:

> "...The effect of the transfer of the promissory notes by Musson to Citibank with the accompanying guarantee was to allow Musson to utilize that amount which was receivable by it from Highgate/Candyman and which they had failed to pay..."

[95] Learned counsel submitted that the documentation presented by Musson could not be accepted or relied upon without examination of the totality of the facts. The learned judge examined the totality of the facts which included the documentation, especially the promissory notes and the guarantee. In so doing, the evidence fell into context and the true intention of the parties was revealed to her.

[96] In advancing his argument that on the totality of the evidence, the learned judge considered all the relevant matters and arrived at the correct conclusion, learned

counsel pointed out, that a guarantor does not receive any money from the lender of money. He submitted that the evidence was that Musson received money from Citibank and the respondent did not. He pointed out that it is unknown in law that a guarantor receives the proceeds of the loan guaranteed as such is paid to the borrower. He relied on the case. **The Liquidators of Overend Gurney & Co (Limited) v The Liquidators of the Oriental Financial Corporation (Limited)** (1874) LR 7 HL 348.

Ground e

The learned judge's finding at paragraph 14 of her judgment that Mr Clarke was a stranger to the details of the arrangement between Citibank and Musson is inconsistent with her finding at paragraph 29 that both parties co-operated to alleviate the problem.

Musson's submissions

[97] Dr Barnett submitted that paragraphs 14 and 29 of the learned judge's decision are inconsistent for the following reasons:

(i) At paragraph 14 of her reasons for judgement, she accepted the respondent's evidence that he co-operated with Mr Blades, by signing the promissory notes so as to enable Citibank to pay Musson thereby averting embarrassment to Mr Blades as a result of Highgate's failure to pay Musson.

(ii) At paragraph 29 of her reasons, she said, "[the respondent] was a stranger to the details of the arrangement between Citibank and Musson".

[98] Learned counsel argued that it was difficult to appreciate that the respondent, having signed the document to allow Musson to obtain funds, could claim to be ignorant of the arrangement. He argued that the respondent is a businessman, a company director and literate. It is to be presumed that he would have read a document before signing it.

[99] Learned counsel submitted that the respondent's signature precludes him from denying the contents of the document, which he freely signed. Moreover, learned counsel argued, the respondent has clearly stated that he signed the promissory notes as a part of an arrangement by which financial assistance would be obtained for his company from Citibank. That evidence, he said, was inconsistent with the learned judge's finding that the respondent ought to be completely absolved of any liability which arose as a result of the promissory notes.

The respondent's submissions

[100] Mr Chen submitted that the learned judge's finding was inevitable in the light of the statements in Ms Dorothy Parkins' letter of 17 August 1998 to Mr Blades in which it was made plain the respondent was not a party to the discussions between Messrs Blades and Moses. He submitted that the subsequent dealings with the promissory notes confirmed that the promissory notes were presented to the respondent for his signature. Also, the evidence from Musson's own witnesses was that there was no discussion with the respondent, he simply signed the notes.

[100] According to Mr Chen, the fact that the respondent co-operated with Mr Blades to enable him to get money from Citibank does not mean that he had knowledge of the details. The transaction which was evidenced by the first promissory note of 18 August 1998 was created by Mr Moses after he met with Mr Blades. The details were contained in the letter of 17 August 1998 and Musson's letter in response.

[101] Learned counsel argued that the transaction in reality was a loan from Citibank to Musson which was documented by way of a promissory note from the respondent to Musson which was being sold to Citibank. As a banker, Mr Moses would have known the true nature of the transaction yet was not called to explain it.

[102] Learned counsel submitted that there was no inconsistency between paragraphs 14 and 29 of the judgment. At paragraph 14, the learned judge recorded Musson's position as stated by its witness, Mr Hoo Fatt, and the respondent's evidence. The learned judge accepted that the respondent did not participate in the discussions with Citibank and did not know the arrangements but was however willing to assist by doing whatever was required by Musson to that end.

[103] At paragraph 29, the learned judge confirmed that the parties were carrying out the scheme devised by Messrs Blades and Moses. Learned counsel submitted that her view was reinforced by the fact that:

(a) between 18 August 1998 to 16 November 2001 the promissory notes were payable to Musson and

subsequently became payable to Citibank without any explanation from Musson; and

(b) the respondent's unchallenged evidence that he signed without noticing the change.

He submitted that paragraphs 14 and 29 are in harmony and they confirm the conclusion that the respondent did not know the details of the arrangement but signed what he was given.

Law/Analysis

Grounds a, c and e

[104] The learned judge, in my view, was correct in concluding that an issue for her determination was whether the respondent was treated as one and the same as Highgate/Candyman by Musson, as the existence of a debt due from him personally is fundamental to the question of unjust enrichment.

Who was indebted to Musson?

[105] Section 88 of the Bills of Exchange Act states:

> "The maker of a promissory note by making it—
>
> (a) engages that he will pay it according to its tenor;
>
> (b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse."

[106] It is settled law that a man of full capacity cannot lightly disown a document which he signs. Over the years, the plea of *non est factum* has evolved from being

applicable only to persons who did not sign the document, to persons who did indeed sign but were blind or illiterate and thus reposed confidence in someone to advise them.

[107] The English House of Lords case, **Saunders v Anglia Building Society** [1970] 3 All ER 961, pushed the boundary further to allow its applicability in the words of Lord Reid, at page 963:

> "...in favour of those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity."

[108] Though extended, the court will not lightly allow the plea to be invoked. As Lord Reid plainly stated:

> "But that does not excuse them from taking such precautions as they reasonably can. The matter generally arises where an innocent third party has relied on a signed document in ignorance of the circumstances in which it was signed, and where he will suffer loss if the maker of the document is allowed to have it declared a nullity. So there must be a heavy burden of proof on the person who seeks to invoke this remedy. He must prove all the circumstances necessary to justify its being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances. I do not say that the remedy can never be available to a man of full capacity. But that could only be in very exceptional circumstances; certainly not where his reason for not scrutinising the document before signing it was that he was too busy or too lazy. In general I do not think that he can be heard to say that he signed in reliance on someone he trusted. **But, particularly when he was led to believe that the document which he signed was not one which affected his legal rights, there may be cases where**

this plea can properly be applied in favour of a man of full capacity." (Emphasis supplied)

[109] Without more, the existence of the promissory notes signed by the respondent is *prima facie* evidence that he was the beneficiary of the sums stated on the said notes which Mr Blades guaranteed. The respondent is not denying having signed the promissory notes or lack of knowledge of its content. His case is that he signed so as to facilitate a loan from Citibank to Musson who was in an embarrassing financial state because of Highgate's indebtedness to it.

[110] Mr Blades with whom the respondent agreed that he would sign the promissory notes has since died. Scrutiny of the evidence is therefore crucial in discovering the parties' intention. In light of the manner in which the case was presented, a determination as to whom the debt belonged, was crucial, as the pith of the respondent's case was that he signed because Highgate's indebtedness to Musson had placed Musson in an embarrassing position. Thus, in order to avert the consequences of that situation, the respondent was asked to lend his signature.

[111] Musson's criticism of the learned judge's finding that Mr Blades and the respondent "would be aware of the difference between the entities of Highgate, Candyman and the person [the respondent]", when in fact the allegation is one of unjust enrichment, is, in my view, wholly unmeritorious. If the respondent's version was credible and corroborated, the learned judge was therefore open to conclude that the respondent was never a personal recipient of any sum from Citibank and thus could not have unjustly enriched himself by refusing to pay Musson's claim for compensation.

[112] I cannot perceive the alleged conflict in the learned judge's statements regarding (i) the arrangement between Messrs Moses and Blades for Citibank to pay Musson the amount which Highgate owed in exchange for a promissory note signed by the respondent and guaranteed by Musson; and (ii) Mr Blade's assertion that Citibank was the only bank willing to give him a loan, but would only do so if the respondent was the signatory on the note, because of the notoriety of Highgate's financial problems in the financial circles.

[113] Indeed, as noted by the learned judge, there was no cogent evidence which was supportive of Musson's contention that the loan was the respondent's or that he benefitted from the sums advanced by Citibank, consequent on his affixing his signature to the promissory notes. The learned judge noted the discrepancies and inconsistencies in the evidence of Mr Hoo Fatt, Mr Walker and Mr Messado. In so doing, she accepted that there was one debt of $7,900,000.00 which became due on 15 August 1998 and that debt resulted from the 5 June 1998 agreement that Musson would take over the distribution of Kraft and Highgate products.

[114] Although it was Mr Hoo Fatt's evidence that the respondent was not asked to sign as a borrower in order to facilitate Musson obtaining funds from Citibank, he was unable to substantiate his assertion. He provided no cogent evidence as to the purport of the promissory notes. Indeed, in my view, the reliable aspects of his evidence were more corroborative of the respondent's version.

[115] It was Mr Hoo Fatt's evidence that Musson maintained two accounts for Highgate and one for the respondent. The debt Musson sought to recover pursuant to the promissory notes, the subject of the claim, concerned the respondent's account, he said. According to Mr Hoo Fatt, the promissory notes issued on 18 August 1998 and 18 November 1999 to Musson by the respondent were not a part of the claim.

[116] Under cross-examination, he however said the promissory note issued on 18 August 1998 arose from a debt due from the respondent. It was also his evidence that the promissory note arose from discussions between the respondent and Mr Blades. The proceeds from the note, he said, have been rolled over since the transaction in 1998.

[117] Mr Hoo Fatt's evidence under cross-examination was that he was informed by Mr Blades that Musson and Highgate/Candyman had entered into a profit sharing arrangement pursuant to an assignment but that he never had sight of the document. It was however his evidence that he was given certain instructions by Mr Blades.

[118] His following admissions, at pages 4 and 5 of the notes of evidence (the record - volume 2 at pages 19-20), supported the respondent's evidence in respect of the agreement between Musson and Highgate:

> "...There is agreement that as of August 15, 1998 goods to be deemed obsolete.
>
> There were a lot of unsold goods at August 15, 1998.
>
> ...Quite a few accounts receivable were deemed uncollectable [sic].

> Between value of goods unsold and collectible [sic] debts was over $7.9 million.
>
> Under terms of Agreement, Highgate and/or Candyman must pay Musson. They did not pay. Agree they did not because they were unable to pay."

[119] He was unable to say whether the respondent was responsible for paying any part of the sum of $7,900,000.00 . He acknowledged that the respondent was not a party to the agreement nor was there any provision in the agreement for him to pay.

[120] Mr Hoo Fatt's evidence was that he was unable to assist the court as to the details of $9,937,524.21 because he was not the accountant. He was however insistent that "[i]t was a debt due from [the respondent]". He evidently conflated the respondent and Highgate thus undermining his credibility as to whom the debt belonged.

[121] It is enlightening to quote aspects of his evidence under cross-examination:

> "Ques. Does [the respondent] have any business with Musson personally?
>
> Ans. Everything Musson had to do with Highgate was[the respondent] . When you say Highgate like you say [the respondent] .
>
> Ques. So when you say [the respondent] you mean Highgate?
>
> Ans. Yes." (Page 25 of the record - volume 2)

[122] Having accepted that the sum of $2,000,000.00 was paid on the account, he was unable to say whether the said sum was paid by Highgate. He however did not dispute nor contradict counsel's assertion that the said sum was paid by Highgate. In respect of

the circumstances surrounding the issuance of the note, he was unable to assist the court.

[123] Instructively Mr Hoo Fatt testified that he took the promissory notes to the respondent for his signature. On his evidence, he was merely a creature of instructions. He said Mr Blades "just calls me and says do this". He was not privy to what transpired at the meetings. He had no conversation with the respondent except "to please sign and give back". He was unable to explain why the payee was changed from Musson to Citibank. It was his evidence that he made no payment to the respondent nor did know of any demand made by Musson on the respondent.

[124] Like Mr Hoo Fatt, Mr Walker also held the view that there was "no difference between Highgate Foods and [the respondent]". He gave evidence that "[i]n [his] mind he would be entitled because [the respondent]/Candyman/Highgate were one and [the] same". He acknowledged under cross-examination, that there was not only a distribution agreement, but also an instrument of deed of assignment of distribution (dated 5 June 1998), between Candyman, Musson and Highgate, which made provision for profit sharing.

[125] Mr Hoo Fatt also acknowledged an agreement of 29 November 2005, between Highgate (debtor), Highgate Holdings Limited (proprietor) and Musson (assignee), in which Highgate acknowledged owing Musson the sum of $28,000,000.00 and that Highgate's failure to honour its debt would result in Musson acquiring the right to Highgate Holdings Limited's trademarks.

[126] The respondent, Mr Walker opined, was the managing director/chairman of Highgate and Candyman and so would be entitled to proceeds from the profit sharing arrangement. However unlike Mr Hoo Fatt, Mr Walker was unable to recall the value of the uncollectible receivables and unsold goods that Highgate, Candyman and the respondent owed to Musson.

[127] Mr Walker's evidence under cross-examination was generally unreliable. His evidence in examination-in-chief conflicted with his cross-examination on salient issues in respect of account number 12005 for example, the balances at important periods, when it was opened. He however accepted that the promissory note which the respondent signed "related to inventory and receivables that Musson took over from Highgate". He was unable to assist the court in respect of the promissory note for the sum of $9,937,524.00.

[128] On the evidence before the learned judge, that is, *inter alia*:

(i) Mr Walker's admission that account numbered 12005 also concerned entries related to Highgate's transactions and that he treated Highgate, Candyman and the respondent as one and the same; and

(ii) Mr Hoo Fatt's declaration of his ignorance as to the details of the arrangements between the respondent and Mr Blades and his acceptance that respondent's account concerned Highgate transactions,

it was entirely within the learned judge's purview to accept, as being more credible, the respondent's evidence, on a balance of probabilities, that there was in fact one debt of $7,900,000.00 which resulted from the agreement of 5 June 1998 for Musson to take over the distribution of Kraft and Highgate products.

[129] She was also entitled to arrive at the conclusion she did that both Mr Blades and the respondent's intention was to bind Highgate/Candyman and not the respondent. Her conclusion that the respondent merely lent his financially good name at Mr Blades' request to facilitate Musson obtaining the loan is supported by the evidence.

[130] In the light of the very reasonable conclusions arrived at by the learned judge, having carefully assessed the evidence, I cannot agree with Musson's claim that her findings were inconsistent with the evidence adduced. The learned judge was justified in her facts and I find no merit in the appellant's challenge in respect of these grounds.

Ground b

The learned judge misunderstood the facts before her and the law applicable thereto.

Musson's submissions

[131] Dr Barnett was critical of the learned judge's statements, set out below:

> "38. By an agreement dated November 29, 2005, Highgate acknowledged that it by then owed Musson $28 million. The parties agreed that Highgate would settle the debt by November 28, 2011 and in consideration of that agreement Highgate Holdings Ltd temporarily assigned its trade marks to Musson. The parties further agreed that if the debt were [sic] not paid by that date it would be deemed settled and the trade marks would remain permanently with Musson. Mr.

> Hoo Fatt, former director of Musson, was aware of that agreement.
>
> ...
>
> 40. The other liability, of which there is evidence, arises under the promissory notes. [The respondent] had promised to pay a specified amount to Musson on some notes and to Citibank on others. The liability was to either Musson or Citibank. Musson is arguing that when it paid as [the respondent's] guarantor on the note which it had sold to Citibank, it had discharged [the respondent's] liability under the promissory note. However, there is no evidence of Musson being compelled or compellable in law to pay that money and there is no evidence of any request/authorization or ratification for any payment. There is no evidence of [the respondent] being aware either of Musson's decision to pay Citibank or of its actual payment."

He submitted that the learned judge's statement, at paragraph 38 of her reasons, in respect of the 29 November 2005 agreement, demonstrated that she erroneously took into consideration Highgate's debt in a way that would "suggest that any liability/sums owed to Musson would be satisfied in any event".

[132] In respect of the respondent's liability under the promissory notes, learned counsel submitted that the finding at paragraph 40 is contrary to Mr Clarke's evidence that:

(i) the arrangements were that Musson would guarantee the debt owed to Citibank;

(ii) he was aware of Citibank's demand for payment of the loan;

(iii) he made no payment; and

(iv) he received no further request for payment of the same.

[133] Learned counsel posited that Musson, having made the payment on behalf of the respondent without his specific request does not, in law, negate the fact that he was unjustly enriched by virtue of that payment. Further, he contended that the payment was made because of Citibank's demand and the fact that Musson was the guarantor. The payment resulted in the discharge of the respondent's liability to Citibank which benefitted him.

[134] It was immaterial, counsel argued, that the respondent did not expressly request Musson to settle his debt with Citibank as Citibank had demanded a payment from Musson that it was legally liable to pay. It was his submission that the learned judge misconstrued the principle that the guarantor has the right to recover sums paid to the lender on behalf of the debtor.

The respondent's submissions

[135] Mr Chen however contended that Musson misconstrued the learned judge's reference in paragraph 38 in respect of the 29 November 2005 agreement. He pointed out that the learned judge "alluded to the correct position that there was no evidence of [the respondent] having a liability to [Musson] under the first transaction of 5th June 1998". The learned judge, he said, "continued in the same vein", by pointing out, that the parties treated the debt as Highgate's. It was his submission that she correctly concluded that the liability was in any event, not the respondent's.

[136] Learned counsel also submitted that those submissions fall under the rubric, "**The Law of Restitution**" in the judgment. The learned judge, he submitted, correctly stated the law at paragraph 35. Although there was confusion as to whose liability was to be discharged, because of the "switch of the payee in the notes" from Musson to Citibank, he submitted that she correctly, at paragraph 36, applied the ingredients of the law to the facts which were before her.

[137] Learned counsel contended that the learned judge was well aware that had the respondent obtained a discharge of his liability by virtue of the payment, he could be ordered to make restitution. He referred the court to Lord Clarke's dicta in the UK Supreme Court decision of **Benedetti v Sawiris and others** [2013] UKSC 50 in which Lord Clarke enunciated the questions to be asked by a court in determining a claim for unjust enrichment.

[138] He argued that the evidence before the learned judge, was that Musson had discounted a note issued to it by the respondent, the proceeds of which Musson received. The real nature of that transaction, he submitted, was a loan to Musson and the uncontroverted evidence, he contended, was that the respondent was not paid any money by either Musson or Citibank in that transaction. It was his submission that Musson has disregarded the true nature of the transaction and sought instead to argue that it was a guarantor. It is to that argument that the learned judge referred at paragraph 40 of her judgment, he said.

[139] Learned counsel further contended that there was no evidence that the payment made by Musson discharged the respondent's liability under the promissory note. The learned judge correctly pointed out that there was no evidence that Musson was compelled or compellable in law to pay the money, nor of any request, authorization or ratification by the respondent for any payment. Nor was there any evidence of the respondent being aware of either Musson's decision to pay or of the actual payment.

[140] The reason for Musson's inability to provide the court with any evidence, he said, was simply that Musson had agreed in its letter of 18 August 1998 which was addressed to Citibank, that in consideration of Citibank purchasing the promissory notes, it would, upon being called upon by Citibank, repurchase the promissory note at the stated price. That agreement was between Citibank and Musson. The respondent had nothing to do with that agreement or with any guarantee.

[141] Musson's arguments in respect of the nature of the relationship between Musson and the respondent and the nature of Musson's payment to Citibank are misconceived, he argued, as the real transaction was a loan by Citibank to Musson.

Grounds d and h

The learned judge erred in law in concluding that the three tenets of the principle of 'unjust enrichment' had not been fulfilled. The benefit gained by the respondent was the discharge of the liability under the promissory note.

The learned judge erred in reaching the conclusion that the respondent did not benefit from the payment by Musson to Citibank and that he was not unjustly enriched.

Musson's submissions

[142] It was Dr Barnett's submission that the three tenets of the principle of unjust enrichment as set out by Goff and Jones in the text The Law of Restitution, Fifth Edition, at pages 15-16, are:

> (i) the defendant must have been enriched by the receipt of a benefit, which included expense saved;
>
> (ii) that benefit must have been gained at the plaintiff's expense; and
>
> (iii) it would be unjust to allow the defendant to retain that benefit.

[143] He stated that the learned authors went on to explain that a defendant gains a benefit if money is paid to a third party to his use, "but at common law he will only benefit if the plaintiff's payment discharges a debt which he owes to a third party". The discharge of a debt is dependent on whether the debtor (the respondent) authorised or subsequently ratified the payment. However, an exception to that rule, he submitted, is where the payer (Musson) is compelled or compellable by law to make the payment and has so paid.

[144] Learned counsel complained that the learned judge erred, in her reasons, by stating that recoupment can only be ordered if the debtor had authorised or ratified the payment and that "no such authorization or ratification occurred here". He submitted

that she failed to (i) consider that the respondent authorised Musson to guarantee the indebtedness and in the event of default, to pay the outstanding amount, with recourse against the promissory note; and (ii) embark upon an examination of the exception that Musson was compelled or compellable by law to pay and so should be reimbursed.

[145] Relying on Halsbury's Laws of England, Fourth Edition Reissue, Volume 40(2), paragraph 1364, learned counsel submitted that the general rule on a compulsory discharge of another's debt is where a payer (Musson) has been compelled by law to pay, or being compellable by law, has paid money a debtor (the respondent) was liable to pay, so that the debtor (the respondent) obtains a benefit of the payment by the discharge of his liability, the debtor (the respondent) is held indebted to the payer (Musson) in the amount of the payment provided certain requirements are satisfied.

[146] He referred the court to paragraph 1366 of the said text, at which he said that the learned author identified an example of compulsory payment for the benefit of another to occur "where a surety...is called upon to pay a sum of money on the default of the principal debtor".

[147] Consequently, learned counsel submitted the learned judge erred when she stated that "it is not enough that the payer was bound by contract to make the payment", but that the compulsion to pay must have been by law. It is clear, he argued, that where a surety (Musson) is called upon to pay in the event of default by the principal debtor (the respondent), the surety (Musson) is entitled to reimbursement.

[148] He submitted further that the learned judge erred when she stated**,** that "it was not clear which liability would have been discharged" and questioned whether it was "the liability of outstanding monies under the 1998 transaction owed to Musson or whether it was the liability to Citibank under the promissory notes". He posited that the question to be resolved was never in relation to the 1998 transaction but rather the promissory notes issued by the respondent to either Musson and/ or to Citibank. Thus, the liability that would have been discharged was that to Citibank on the promissory notes, he submitted.

[149] Dr Barnett also relied on Scarman LJ's statement, at page 412, in **Owen v Tate and Another** [1976] 1 QB 402. He submitted that Musson was compelled by law, as guarantor of the loan to the respondent by Citibank, to pay Citibank on the respondent's liability, when the respondent failed to do so upon demand; Musson did not "officiously intervene". Accordingly, the respondent would have received a benefit at the expense of Musson, was unjustly enriched and ought therefore to make restitution.

The respondent's submissions

[150] Mr Chen however submitted that the learned judge correctly stated the law of restitution and correctly applied it to the facts proven before her. He argued that there was no debt due from the respondent to anyone. The evidence which the learned judge accepted was that the issuance of the promissory note on which Musson relied was a "contrivance created in a series of contrivances to give effect to the scheme devised by

Mr. Desmond Blades and Mr. Moses to gain access to the money due to [Musson] from Highgate/Candyman under the 1998 deal to take over the distribution".

[151] It was his submission that the learned judge accepted the respondent's evidence that there was only one debt due, and that was the debt from Highgate/Candyman to Musson which debt resulted from the agreement of June 1998 and became payable on 15 August 1998.

[152] Learned counsel submitted that, on the evidence which was before the learned judge, Mr Blades met with Mr Moses at Citibank to devise a scheme whereby Musson could be paid the debt. The respondent did not participate in the scheme. On that evidence, he said the learned judge could arrive at no other conclusion. He relied on the letter of 17 August 1998 from Citibank to Musson which, he submitted, provides evidence beyond a reasonable doubt that Mr Blades, Mr Moses and Ms Dorothy Parkins met and worked out the deal which is detailed in that letter.

[153] Learned counsel contended that the need "to send the proposed promissory note to [Musson] for delivery to and execution by the Respondent corroborates the Respondent's evidence that he did not participate in the negotiations with Citibank but that he simply signed whatever documents Mr Blades sent to him in accordance with his arrangement to assist Mr Blades to gain access to the money". He further submitted that if the respondent had been present at the meeting "he would simply have signed the note as prepared by Citibank".

[154] The learned judge, Mr Chen submitted, rightly accepted the respondent's evidence that apart from signing the promissory notes as he was asked to do, he did not participate in the arrangements between Mr Blades and Citibank and was ignorant as to what they did. That evidence, he submitted, led the learned judge to conclude that the respondent was not knowingly an accommodating party.

[155] Learned counsel submitted that, on the evidence of Musson's witnesses and its pleadings, the promissory note of 17 November 2000 was in fact a rollover of the original note of 18 August 1998 which Citibank paid Musson the price for purchasing. The person who would have been able to explain what transpired between Mr Blades and Mr Moses, when the arrangements were made with Citibank, would have been Mr Moses himself. It was in the interest of the truth that he be called but he was not called, he submitted.

[156] Learned counsel pointed out that the respondent had obtained an undertaking on 30 April 2010 from Musson that it would call Mr Moses at the trial. That undertaking was given in the face of a witness summons that the respondent's attorneys-at-law had prepared for issue by the court. However, upon the undertaking being given by Musson, the witness summons was never issued.

[157] The trial commenced 10 days after the undertaking was given by Musson for Mr Moses to attend the trial but he did not attend. The explanation given was that he was off the island. The respondent elected to proceed without insisting on the undertaking being fulfilled and the matter commenced without the presence of Mr Moses.

[158] The learned judge, he said, has made it clear that her decision was based on the evidence presented to the court. In the absence of evidence from Mr Moses, she had to come to the conclusion that she did based on the documentation and the evidence of the respondent. It was his submission that the evidence on the documents corroborated what the respondent said in his witness statements, affidavits and cross-examination. Learned counsel contended that the witnesses called by Musson and their witness statements and affidavits either agreed with the respondent or were in disarray, on this point (the arrangements for Mr Blades to gain access to the money owed to it by Highgate/Candyman), when they did not.

[159] From the documentary evidence in respect of the arrangement between Citibank, Musson and the respondent in August 1998 concerning the creation and sale of the promissory note, it is clear that no money was paid by Citibank to the respondent, learned counsel submitted. Musson, on the other hand, has admitted that it was paid by Citibank for the purchase of the note.

[160] Learned counsel explained that the transaction was a loan to Musson in the form of an accommodation note which the respondent issued to the Musson to enable it (Musson) to obtain money from Citibank on the understanding that Musson would repurchase the note if the drawer defaulted. That arrangement, he submitted, is known in the world of commerce.

[161] Upon altering of the form of the transaction on the issue of the first promissory note to Citibank as payee and the respondent as drawer, it was necessary for Musson

to have provided evidence to explain how and why this happened. The evidence that was adduced on cross-examination from Musson's witnesses was that it was a rollover of the note of August 1998. There was no explanation forthcoming, he submitted, as to the reason the payee was changed from Musson to Citibank. Mr Moses' evidence might have been helpful to the court in this regard, he argued. It was therefore necessary for Musson to have provided an explanation.

[162] Learned counsel submitted that the transaction which resulted in Citibank becoming the payee was unknown to normal commercial dealings. Consequent on that transaction, no loan was made to the respondent (the drawer) by Citibank (the payee) but the purchase price of the first note was paid to Musson (the guarantor) and all rollover amounts on the issue of the promissory notes credited to Musson (the guarantor). That transaction, he said, was unknown in ordinary commercial transactions that the lender pays out the loan to the guarantor. Mr Moses was not available to the court to explain this oddity.

[163] In those circumstances, learned counsel submitted, the conclusion of the learned judge that no money or other benefit was conferred on the respondent is correct. The respondent therefore had no legal liability to pay Citibank any money nor had any liability to Musson. That being so he could not have been unjustly enriched.

Ground f

The learned judge misconstrued the law on guarantee

Musson's submissions

[164] Dr Barnett relied on his submissions in respect of grounds d, h and g and further submitted that the learned judge erred in omitting and failing to consider the "just and reasonable" aspect of Scarman LJ's judgment in **Owen v Tate**. He argued that the circumstances of the case required those considerations because Musson had discharged the respondent's liabilities and has not been reimbursed. Learned counsel said the respondent acknowledged that he had liabilities which he no longer has and which he made no payments to discharge. The respondent, he submitted, has therefore been unjustly enriched and in the circumstances, it would be just and reasonable for Musson to be reimbursed.

The respondent's submissions

[165] Mr Chen submitted that the law of guarantee was irrelevant to the case at bar as the facts clearly established that the real transaction was a loan from Citibank to Musson and the respondent never had a liability to Citibank. He pointed out that it would be untenable that a guarantee could exist where the loan was disbursed to the guarantor. Accordingly, he submitted, Musson ought not to be entitled to subrogation when the original loan was disbursed to it.

Ground g

The learned judge erred in reaching her conclusion on the issue of subrogation.

Musson's submissions

[166] Learned counsel, Dr Barnett was critical of the learned judge's statement on subrogation. The learned judge expressed the view that:

> "Subrogation is a remedy available to prevent unjust enrichment and is used in certain circumstances such as Bills of Exchange and guarantees...However, where a surety guarantees a debt he cannot be subrogated to the creditor without the debtor having consented to the guarantee and to the discharge of the debt." (Paragraph 42)

[167] It was his submission that, although the learned judge relied on Scarman LJ's statement in **Owen v Tate**, she neglected the following quintessential statement of the learned judge which supported Musson:

> "But if he can show that in the particular circumstances of the case there was some necessity for the obligation to be assumed, then the law will grant him a right of reimbursement if in all the circumstances it is just and reasonable to do so." (Page 412)

[168] Musson, learned counsel contended, was not only liable to satisfy the respondent's debt but it was compelled to do so in light of Scarman LJ's above mentioned ratio. He submitted that in all the circumstances, Musson was entitled to recover.

[169] Learned counsel further submitted that Musson waived its right to subrogation only in respect of Citibank. The learned judge erred, he said, by her statement that:

> "...The remedy of subrogation may have been available to Musson to recover its money from [the respondent] but it had agreed with Citibank not to pursue that remedy..." (paragraph 48)

He contended that the remedy is still available against the respondent which, in part, accounts for the claim of unjust enrichment.

[170] He argued that there is an important proviso to paragraph 9 of the guarantee and indemnity on which the learned judge relied which states:

> "The Guarantor waives all rights of subrogation and agrees not to claim any set-off or counterclaim against the Principal Debtor...until the Guaranteed Obligations and all obligations and liabilities...owing or incurred to the Bank from or by the Principal Debtor have been paid or discharged in full."

The respondent's submissions

[171] Mr Chen submitted that Musson's argument is based on a fundamental error as the learned judge's conclusion was that the respondent was not unjustly enriched because there was no debt due from him. Further, he submitted that Musson's argument failed to consider the real terms of the transaction with Citibank which, he said, is recorded in the letter of 18 August 1998 from Musson to Citibank. The parties agreed that regardless of any question of validity of the promissory note, Musson would repurchase the promissory note on the terms set out in the letter. He said it is not an indemnity or a guarantee.

[172] He refuted Musson's argument that the proviso at paragraph 9 of the guarantee and indemnity is relevant and argued that that submission reveals a misunderstanding of the transaction. He submitted that the proviso is inapplicable because there is no

liability from the respondent (the principal debtor) to Citibank as the money paid out by Citibank on each renewal of the notes was credited to Musson. The respondent, he said, did not receive a single payment. This is a common ground between the parties and an inescapable conclusion of the learned judge.

Discussion/law

[173] Grounds b, d, f, g and h all relate to the determining issue, whether the respondent derived any benefit and was thereby unjustly enriched by the payments made by Musson to Citibank. They will therefore be considered together. Lord Scarman's statement in **Owen v Tate**, referred to by Dr Barnett, is as follows:

> "When one turns to the second general rule, namely, the rule that where a person is compelled by law to make a payment for which another is primarily liable he is entitled to be indemnified**, notwithstanding the lack of any request or consent,** one again finds that the law recognises exceptions. This rule has been subjected to very careful treatment in *Goff and Jones*, *The Law of Restitution* (1966), p. 207. The authors say, after stating the rule in general terms:
>
> > 'To succeed in his claim, however, the plaintiff must satisfy certain conditions. He must show (1) that he has been compelled by law to make the payment; (2) that he did not officiously expose himself to the liability to make the payment; (3) that his payment discharged a *liability* of the defendant; and (4) that both he and the defendant were subject to a common demand by a third party, for which, **as between the plaintiff and the defendant, the latter was primarily responsible**.'" (Page 407) (Italics as in original and emphasis supplied)

[174] In a later edition of their work, The Law of Restitution 1998, Fifth Edition, the learned authors Goff and Jones, at page 15, said this of the principle of restitution:

> "In restitution, as in other subjects, recourse must be had to the decided cases in order to transfer general principle into concrete rules of law. As Lord Wright once said of Lord Mansfield's famous dictum in *Moses v. Macferlan*: 'Like all large generalisations, it has needed and received qualifications in practice...The standard of what is against conscience in this context has become more or less canalised or defined, but in substance the juristic concept remains as Lord Mansfield left it.'
>
> As might be expected a close study of the English decisions, and those of other common law jurisdictions, reveals a reasonably developed and systematic complex of rules. It shows that the principle of unjust enrichment is capable of elaboration and refinement. It presupposes three things. First, the defendant must have been enriched by the receipt of a *benefit*. Secondly, that benefit must have been gained *at the plaintiff's expense*. Thirdly, it would be *unjust* to allow the defendant to retain that benefit. These three subordinate principles are closely interrelated, and cannot be analysed in complete isolation from each other. Examination of each of them throws much light on the nature of restitutionary claims and the principle of unjust enrichment." (Italics as in original)

Has the respondent received a benefit?

[175] The learned judge's acceptance of the respondent's evidence that the promissory notes were consequent on the August 1998 transaction between Musson and Highgate/Candyman is eminently reasonable in the light of the evidence given by Musson. Mr Hoo Fatt having accepted that Highgate/Candyman was indebted to Musson in a sum of about $7,900,000.00 and Musson's witnesses' inability to provide credible and or any cogent evidence that the sum claimed was personally owed by the respondent.

[176] It is trite law that a director of a company is not personally liable for the debts of a company. It is immaterial that the respondent was the majority shareholder in both companies. It is settled law that the respondent has a separate legal personality from Highgate and Candyman. There is between the respondent and Highgate/Candyman, a corporate veil which has not been pierced. See **Salomon v Salomon and Company Limited** [1897] AC 22.

[177] The respondent's evidence, which the learned judge, accepted was that the promissory note of 18 August 1998 was to prevent financial embarrassment to Musson consequent on Musson's cash flow problems which resulted from Highgate's indebtedness to it. On the evidence, the respondent derived no personal benefit, indeed the proceeds from the sale of the promissory note of 18 August 1998, was credited to Musson's account in order to facilitate Musson's ability to access a loan so as to alleviate its cash flow problems occasioned by Highgate's indebtedness.

[178] The learned judge's acceptance of the respondent's evidence that he signed the promissory notes at Mr Blades' request in circumstances outlined by him, cannot be faulted as: (i) Musson's witnesses were not privy to the arrangement between the respondent and Mr Blades; and (ii) she accepted the respondent's evidence that the debt was Highgate/Candyman's in the light of Messrs Walker and Hoo Fatt's admissions.

Was the just and reasonable principle applicable?

[179] At pages 411-412 of **Owen v Tate**, Lord Scarman LJ enunciated:

> "In my judgment, the true principle of the matter can be stated very shortly, without reference to volunteers or to the compulsions of the law, and I state it as follows. If without an antecedent request a person assumes an obligation or makes a payment for the benefit of another, the law will, as a general rule, refuse him a right of indemnity. But if he can show that in the particular circumstances of the case there was some necessity for the obligation to be assumed, then the law will grant him a right of reimbursement if in all the circumstances it is just and reasonable to do so."

[180] It is necessary to examine the circumstances of this case which includes the reason Musson was compelled to pay Citibank in order to determine whether the just and reasonable principle ought to have been considered and applied by the learned judge. Lord Scarman, at page 408 in **Owen v Tate**, succinctly elucidated its applicability thus:

> "That means clearly that circumstances alter cases...One may have a general rule..., but that general rule derives from the principle of what is just and reasonable in all the circumstances of the case."

[181] The incontrovertible evidence is that the respondent was not personally indebted to Musson. As already noted, Highgate/Candyman was indebted to Musson as a result of the arrangement of 5 June 1998. Musson, as guarantor, was the recipient of the loan proceeds from Citibank and not the respondent. The respondent was therefore under no obligation to indemnify Musson. The circumstances of this case, in light of the learned judge's findings therefore did not require the learned judge to specifically speak to that issue.

[182] Indeed the circumstances of this case alter the applicability of the general principles. As Mr Chen pointed out, the circumstances of this case deviated from the

norm. Musson as guarantor received the proceeds of the loan and not the respondent. The authorities of **Glasscock v Balls and Mason v Lack** are therefore distinguishable. Grounds b, d, f, g and h therefore fail.

Ground i

Generally, the findings by the learned judge on the issues are, at times, inconsistent, erroneous and unsupportable.

Musson's submissions

[163] Dr Barnett relied on his previous submissions in respect of the other grounds which he contended reveal that the learned judge's findings were at times inconsistent with the facts/evidence and therefore unsupportable. He cited the learned judge's following findings as examples:

> "22. It would therefore be useful to consider here, the evidence as to who was/were indebted to Musson. Musson has provided evidence of accounts it maintained for monies owed to it by [the respondent], Highgate and Candyman. The only evidence of indebtedness of [the respondent] or the companies to Musson is the indebtedness which resulted from the agreement created on August 15, 1998 [sic] that Musson would take over the distribution of Highgate products.
>
> ...
>
> 26. ...on a balance of probabilities that the agreement was between Musson, Candyman and Highgate and that that was the intention of the parties. Both the late Mr. Blades and [the respondent] held critical positions in their respective businesses which they represented in the Highgate/Candyman transaction. I find that each would be aware of the difference between the entities Highgate, Candyman and the person [the respondent] and that they put the words in the agreement reflecting their intention to

> bind Highgate, Candyman and Musson only, not [the respondent] in his personal capacity.
>
> ...
>
> 29. ...the promissory notes were eventually written with Citibank, not Musson, as the lender. The promissory notes drawn by [the respondent] from August 18, 1998 to November 16, 2001 showed Musson as the lender but from February 20, 2002 to December 2003 they showed Citibank as the lender. Musson's witnesses provide no explanation as to why this change occurred. [The respondent's] unchallenged evidence is that on each occasion Musson's representatives handed him the promissory note to sign and he signed, not noticing that there had been a change in the payee. [The respondent] was a stranger to the details of the arrangement between Citibank and Musson."

[164] I am however of the view, in light of the foregoing, that the learned judge's findings are unassailable. So too are her findings and opinions expressed below.

> "14. Mr Hoo Fatt, a former director of Musson confirmed that as of that date [15 August 1998] Highgate/Candyman owed Musson about $7.9 million and were unable to pay. [The respondent's] testimony is that he agreed to co-operate with the late Mr. Blades, chairman and managing director of Musson, to prevent Mr. Blades' expressed embarrassment at Highgate's failure to pay which was resulting in a cash flow problem for Musson. At Mr. Blades' request he therefore signed a promissory note dated August 18, 1998 which would allow Citibank to pay Musson the amount of the note, $9,937,524.21 and he thereafter continued to renew the note in accordance with the requests from Mr. Blades.
>
> ...
>
> 23. The Financial Controller of Musson, Mr. Geoffrey Messado, swears in his affidavit that Musson has no documents showing that Highgate was ever indebted to Musson. His evidence is that the debt being claimed is a personal debt of [the respondent] which Mr. Messado says is

confirmed by the promissory note of August 18, 1998. He gave no evidence as to how that personal debt arose.

...

Is [the respondent] bound?

32. However, [the respondent] voluntarily signed the promissory notes. Is he bound by them? The last note exhibited which [the respondent] signed is dated December 19, 2003. In it he promised to pay to Citibank the amount of $5.5 million with the Citibank having full recourse to Musson.

The Bills of Exchange Act states:

'The maker of a promissory note by making it — (a) engages that he will pay it according to its tenor; (b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.'

It is [the respondent's] case that he signed the note with no intention to make a binding note for which he would be responsible but rather, he did so to assist the late Mr. Blades/Musson. He personally was gaining no benefit." (Emphasis and italics as in original)

[165] I am however am in agreement with Mr Chen's submission that the findings of the learned judge are consistent with the evidence presented to her. There was no evidence before the learned judge that the respondent nor Highgate/Candyman derived any benefit from the arrangement and or from signing the promissory note. The evidence was that:

b) Highgate/Candyman remained liable for their outstanding debt until 28 November 2011;

b) the appellant had taken Highgate Holdings Limited's trade marks for the debt;

c) the admission by Musson's witnesses that the money was paid to Musson; and

d) the contemporaneous records which clearly admitted that the money was paid to the Musson.

Disposal

[167] In the light of the foregoing, it is unnecessary for me to make any determination on the counter-notice of appeal filed by the respondent. I would therefore dismiss the appeal with costs to the respondent to be taxed if not agreed.

P WILLIAMS JA (AG)

[168] I have read in draft the judgments of my brother Brooks JA and my sister Sinclair-Haynes JA and agree that this appeal should be dismissed.

BROOKS JA

ORDER

1. Appeal dismissed.
2. No order made in respect of counter-notice of appeal.
3. Costs to the respondent on the appeal to be taxed if not agreed.
4. No order made in respect of costs in respect of the counter-notice of appeal.